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CHAPTER 10

APPEAL AND HEARING PROCEDURES

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CHAPTER 10  
APPEAL AND HEARING PROCEDURES

A. GENERAL

This chapter sets forth the policies and procedures for appealing decisions made by **OCHAMPUS**, **OCHAMPUSEUR**, and CHAMPUS contractors adversely affecting the rights and liabilities of CHAMPUS beneficiaries, CHAMPUS participating providers, and providers denied the status of authorized provider under CHAMPUS. An appeal under CHAMPUS **is** an administrative review of program determinations made under the provisions of law and regulation. An appeal cannot challenge the propriety, equity, or legality of any provision of law or regulation.

1. Initial determination

a. Notice of initial determination and right to appeal

(1) **OCHAMPUS**, **OCHAMPUSEUR**, and CHAMPUS contractors shall mail notices of initial determinations to the affected provider or CHAMPUS beneficiary (or representative) at the last known address. For beneficiaries who are under 18 years of age **or** who are incompetent, a notice issued to the parent, guardian, or other representative, under established CHAMPUS procedures, constitutes notice to the beneficiary.

(2) CHAMPUS contractors and **OCHAMPUSEUR** shall notify a provider of an initial determination on a claim only if the provider participated in the claim. (See Chapter 7 of this Regulation. )

(3) CHAMPUS peer review organizations shall notify providers and fiscal intermediaries of a denial determination on a claim.

(4) Notice of an initial determination on a claim processed by a CHAMPUS contractor or **OCHAMPUSEUR** normally will be made on a CHAMPUS Explanation of Benefits (**CEOB**) form.

(5) Each notice of an initial determination on a request for benefit authorization, a request by a provider for approval as an authorized CHAMPUS provider, or a decision to disqualify or exclude a provider as an authorized provider under CHAMPUS shall state the reason for the determination and the underlying facts supporting the determination.

(6) In any case when the initial determination is adverse to the beneficiary or participating provider, or to the provider seeking approval as an authorized CHAMPUS provider, the notice shall include a statement of the beneficiary's or provider's right to appeal the determination. The procedure for filing the appeal also shall be explained.

b. Effect of initial determination. The initial determination is final unless appealed in accordance with this chapter, or unless the initial determination is reopened by **OCHAMPUS**, the CHAMPUS contractor, or the CHAMPUS peer review organization.

2. Participation in an appeal. Participation in an appeal is limited to any party to the initial **determination**, including CHAMPUS, and authorized representatives of the parties. Any party to the initial determination, except CHAMPUS, may appeal an adverse determination. The appealing party is the party who actually files the appeal,

a. Parties to the initial determination. For purposes of the CHAMPUS appeals and hearing procedures, the following are not parties to an initial determination and are not entitled to administrative review under this chapter.

(1) A provider disqualified or excluded as an authorized provider under CHAMPUS based on a determination of abuse or fraudulent practices or procedures under another Federal or federally funded program is not a party to the CHAMPUS action and may not appeal under this chapter.

(2) A beneficiary who has an interest in receiving care **or** has received care from a particular provider cannot be an appealing party regarding the exclusion, suspension, or termination of the provider under Chapter"9 of this Regulation.

(3) A sponsor or parent of a beneficiary under 18 years of age or guardian of an incompetent beneficiary is not a party to the initial determination and may not serve as the appealing party, although such persons may represent the appealing party in an appeal.

(4) A third party, such as an insurance company, is not a **party** to the initial determination and is not entitled to appeal even though it may have an indirect interest in the initial determination.

(5) A nonparticipating provider is not a party to the initial determination and may not appeal.

b. **Representative.** Any party to the initial determination may appoint a representative to act on behalf of the party in connection with an appeal. Generally, the parent of a minor beneficiary and the legally appointed guardian of an incompetent beneficiary shall be presumed to have been appointed representative without specific designation by the beneficiary.

(1) The representative shall have the same authority as the party to the appeal and notice given to the representative shall constitute notice required to be given to the party under this Regulation.

(2) To avoid possible conflicts of interest, an officer or employee of the United States, such as an employee or member of a Uniformed Service, including an employee or staff member of a Uniformed Service legal office, or a CHAMPUS advisor, subject to the exceptions in 18 U.S.C. 205 (reference (hh)), is not eligible to serve as a representative. An exception usually is made for an employee or member of a Uniformed Service who represents an immediate family member. In addition, the Director, **OCHAMPUS**, or designee, may appoint an officer or employee of the United States as the CHAMPUS representative at a hearing.

3. **Burden of proof.** The burden of proof is on the appealing party to establish affirmatively by substantial evidence the appealing party's entitlement under law and this Regulation to the authorization of CHAMPUS benefits, approval of authorized CHAMPUS provider status, or removal of sanctions imposed under Chapter 9 of this Regulation. If a presumption

exists under the provisions of this Regulation or information constitutes prima facie evidence under the provisions of this Regulation, the appealing party must produce evidence reasonably sufficient to rebut the presumption or prima facie evidence as part of the appealing **party's** burden of proof. CHAMPUS shall not pay any part of the cost or fee, including attorney fees, associated with producing or submitting evidence in support of an appeal.

4. Evidence in appeal and hearing cases. Any relevant evidence may be used in the administrative appeal and hearing process if it is the type of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of such evidence over objection in civil or criminal courts.

5. Late filing. If a request for reconsideration, formal review, or hearings is filed after the time permitted in this chapter, written notice **shall** be issued denying the request. Late filing may **be** permitted only if the appealing party reasonably can demonstrate to the satisfaction of the Director, **OCHAMPUS**, or a designee, that the timely filing of the request was not feasible due to extraordinary circumstances over which the appealing party had no practical control. Each request for an exception to the filing requirement will be considered on its own merits. The decision of the Director, **OCHAMPUS**, or a designee, on the request for an exception to the filing requirement shall be final.

6. Appealable issue. An appealable issue is required in order for an adverse determination to be appealed under the provisions of this chapter. Examples of issues that are not appealable under this chapter include:

- a. A dispute regarding a requirement of the law or regulation.
- b. The amount of the CHAMPUS-determined allowable cost or charge, since the methodology for determining allowable costs or charges is established by this Regulation.
- c. The establishment of diagnosis-related groups (DRGs), or the methodology for the classification of inpatient discharges within the DRGs, or the weighting factors that reflect the relative hospital resources used with respect to discharges within each DRG, since each of these is established by this Regulation.
- d. Certain other issues on the basis that the authority for the initial determination is not vested in CHAMPUS. Such issues include but are not limited to the following examples:

(1) Determination of a person's eligibility as a CHAMPUS beneficiary is the responsibility of the appropriate Uniformed Service. Although **OCHAMPUS**, **OCHAMPUSEUR**, and CHAMPUS contractors must make determinations concerning a beneficiary's eligibility in order to ensure proper disbursement of appropriated funds on each CHAMPUS claim processed, ultimate responsibility for resolving a beneficiary's eligibility rests with the Uniformed Services. Accordingly, disputed question of fact concerning a

beneficiary's eligibility will not be considered an appealable issue under the **provisions of** this chapter, but shall be resolved in accordance with Chapter 3 of this Regulation.

(2) Similarly, decisions relating to the issuance of a **Nonavailability** Statement (DD Form 1251) in each case are made by the Uniformed Services. Disputes over the need for a Nonavailability Statement or a refusal to issue a Nonavailability Statement are not appealable under this chapter. The one exception is when a dispute arises over whether the facts of the case demonstrate a medical emergency for which a Nonavailability Statement is not required. Denial of payment in this one situation is an appealable issue.

(3) Any sanction, including the period of the sanction, imposed under Chapter 9 of this Regulation which is based solely on a provider's exclusion or suspension by another agency of the Federal Government, a state, or a **local** licensing authority is not appealable under this chapter. The provider must exhaust administrative appeal rights offered by the other agency that made the initial determination to exclude or suspend the provider. Similarly, any sanction imposed under Chapter 9 which is based solely on a criminal conviction or civil judgment against the provider is not appealable under this chapter. If the sanction imposed under Chapter 9 is not based solely on the provider's criminal conviction or civil judgment or on the provider's exclusion or suspension by another agency of the Federal Government, a state, or a local licensing authority, that portion of the **CHAMPUS** administrative determination which is in addition to the criminal **conviction/civil** judgment or exclusion/suspension by the other agency may be appealed under this chapter.

**e.** A decision by the Director, **OCHAMPUS**, or a designee, as a suspending official when the decision is final under the provisions of Chapter 9, Section **H.1.d.(1)**.

**7. Amount in dispute.** An amount in dispute is required for an adverse determination to be appealed under the provisions of this chapter, except as set forth below.

**a.** The amount in dispute is calculated as the amount of money CHAMPUS would pay if the services and supplies involved in dispute were determined to be authorized CHAMPUS benefits. Examples of amounts of money that are excluded by the Regulation from CHAMPUS payments for authorized benefits include, but are not limited to:

(1) Amounts in excess of the CHAMPUS-determined allowable charge or cost.

(2) The beneficiary's CHAMPUS deductible and cost-share amounts.

(3) Amounts that the CHAMPUS beneficiary, or parent, guardian, or other responsible person has no legal obligation to pay.

(4) Amounts excluded under the provisions of Chapter 8 of this Regulation.

b. The amount of dispute for appeals involving a denial of a request for authorization in advance of obtaining care shall be the estimated allowable charge or cost for the services requested.

c. There is no requirement. for an amount in dispute when the appealable issue involves a denial of a provider's request for approval as an authorized CHAMPUS provider; the determination to exclude, suspend, or terminate a provider's authorized CHAMPUS provider status; or the determination of circumvention of the CHAMPUS **DRG-based** payment system **by** a provider.

d. Individual claims may be combined to meet the required amount in dispute if all of the following exist:

(1) The claims involve the same beneficiary.

(2) The claims involve the same issue.

(3) At least one of the claims so combined has had a reconsideration decision issued by **OCHAMPUSEUR**, a CHAMPUS contractor, or a CHAMPUS peer review organization.

NOTE : A request for administrative review under this appeal process which involves a dispute regarding a requirement of law or regulation (paragraph **A.6.a.** above) or does not involve a sufficient amount in dispute (subsection A.7. above) may not be rejected at the reconsideration level of appeal. However, an appeal shall involve an appealable issue and sufficient amount in dispute under these subsections to be granted a formal review or hearing.

8. **Levels of appeal.** The sequence and procedures of a CHAMPUS appeal vary, depending on whether the initial determination was made by **OCHAMPUS**, **OCHAMPUSEUR**, a CHAMPUS contractor, or a CHAMPUS peer review organization.

a. Appeal levels for initial determination made by **OCHAMPUSEUR**, CHAMPUS contractor, or CHAMPUS peer review organization.

(1) Reconsideration by **OCHAMPUSEUR**, CHAMPUS contractor, or CHAMPUS peer review organization.

(2) Formal review **by OCHAMPUS** (except for CHAMPUS peer review organization reconsiderations) .

(3) Hearing.

b. Appeal **levels** for initial determination made by **OCHAMPUS**

(1) Formal review by **OCHAMPUS** except (a) initial determinations involving the suspension of claims processing where the Director, **OCHAMPUS**, or a designee, determines that additional proceedings are necessary as to disputed material facts and the suspending official's decision is not final under the provisions of Chapter 9, Section H.1.d. (1) or (b) initial determinations involving the sanctioning (exclusion, suspension, or termination) of CHAMPUS providers. Initial determinations involving these matters **shall** be appealed directly to the hearing level.

(2) Hearing.

9. Appeal decision. An appeal decision at any level may address all pertinent issues which arise under the appeal or are **otherwise** presented by the information in the case record (for example, the entire episode of care in the appeal), and shall not be limited to addressing the specific issue appealed by a party. In the case of sanctions imposed under Chapter 9, the final decision may affirm, increase or reduce the sanction period imposed by CHAMPUS, -or otherwise modify or reverse the imposition of the sanction.

B. RECONSIDERATION

Any party to the initial determination made by **OCHAMPUSEUR**, the CHAMPUS contractor, or a CHAMPUS peer review organization may request a reconsideration.

1. Requesting a reconsideration

a. Written request required. The request must **be** in writing, **shall** state the specific matter in dispute, and shall include a copy of the notice of initial determination (such as the CEOB form) made by **OCHAMPUSEUR**, the CHAMPUS contractor, or the CHAMPUS peer review organization.

b. Where to file. The request shall be submitted to the office that made the initial determination (i.e., **OCHAMPUSEUR**, the CHAMPUS contractor, or the CHAMPUS peer review organization) or any other CHAMPUS contractor designated in the notice of initial determination.

c. Allowed time to file. The request must **be** mailed within 90 days after the date of **the notice** of initial determination.

d. Official filing date. A request for a reconsideration shall be deemed filed on the date it is mailed and postmarked. If the request does not have a postmark, it shall be deemed filed on the date received by **OCHAMPUSEUR**, the CHAMPUS contractor or the CHAMPUS peer review organization.

2. The reconsideration process. The purpose of the reconsideration is to determine whether the initial determination was made in accordance with **law**, regulation, policies, and guidelines in effect at the time the care was provided or requested, or at the time of the initial determination **and/or** reconsideration decision involving a provider request for approval as an authorized provider under CHAMPUS. The reconsideration is performed by a member of the **OCHAMPUSEUR**, CHAMPUS contractor, or CHAMPUS peer review organization staff who was not involved in making the initial determination and is a thorough and independent review of the case. The reconsideration is based on the information submitted that led to the initial determination, plus any additional information that the appealing party may submit or **OCHAMPUSEUR**, the CHAMPUS contractor, or CHAMPUS peer review organization may obtain.

3. Timeliness of reconsideration determination. **OCHAMPUSEUR**, the CHAMPUS contractor, or CHAMPUS peer review organization normally shall issue its reconsideration determination no later than 60 days from the date of receipt of the request for reconsideration by **OCHAMPUSEUR**, the CHAMPUS contractor, or the CHAMPUS peer review organization.



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4. Notice of reconsideration determination. **OCHAMPUSEUR**, the CHAMPUS contractor, or the **CHAMPUS** peer review organization shall issue a written notice of the reconsideration determination to the appealing party at his or her last known address. The notice of the **reconsideration** determination must contain the following elements:

- a. A statement-of the issue or issues under appeal.
- b. The provisions of law, regulation, policies, and guidelines that apply to the **issue or** issues under appeal.
- c. A discussion of the original and additional information that is relevant to the issue or issues under appeal.
- d. Whether the reconsideration upholds the initial determination or reverses it, in whole or in part, and the rationale for the action.
- e. A statement of the right to appeal further in any case when the reconsideration determination is less than **fully** favorable to the appealing party and the amount in dispute is \$50 or more.

5. Effect of reconsideration determination. The reconsideration **deter-**mination is final if either of the following exist:

- a. The amount in dispute is less than \$50.
- b. Appeal rights have been offered, but a request for formal review is not received by **OCHAMPUS** within 60 days of the date of the notice of the **reconsideration** determination.

c. FORMAL REVIEW

Except as explained below, any party to an initial determination made by **OCHAMPUS**, or a reconsideration determination made by the CHAMPUS contractor may request a formal review by **OCHAMPUS** if the party is dissatisfied with the initial or reconsideration determination unless the initial or reconsideration determination (1) is final under paragraph (b)(5) above; (2) involves the sanctioning of a provider by the exclusion, suspension or termination of authorized provider status; (3) involves a written decision issued pursuant to Section 199.9, paragraph (ha) regarding the temporary suspension of **claims** processing; or (4) involves a reconsideration determination by a CHAMPUS peer review organization. A hearing, but not a **formal** review level of appeal, may be available to a party to an initial determination involving the sanctioning of a provider or to a party to a written decision involving a temporary suspension of claims processing. A beneficiary (or an authorized representative of a beneficiary), but not a provider, may request a hearing, but not a formal review, of a reconsideration determination made by a CHAMPUS peer review organization.

1. Requesting a formal review

- a. Written request required. The request must be in writing, shall state the specific matter in dispute, shall include copies of the written determination

(notice of reconsideration determination or **OCHAMPUS** initial determination) being appealed, and shall include any additional information or documents **not** submitted previously.

b. Where to file. The request shall be submitted to the Chief, Appeals and Hearings, **OCHAMPUS**, Aurora, Colorado 80045-6900.

c. Allowed time to file. The request shall be mailed within 60 days after the date of the notice **of** the reconsideration determination **or OCHAMPUS** initial determination being appealed.

d. Official filing date. A request for a formal review shall be deemed filed on the date it is mailed and postmarked. If the request does not have a postmark, it **shall** be deemed filed on the date received by **OCHAMPUS**.

2. The formal review process. The purpose of the formal review is to determine whether the initial determination or reconsideration determination was made in accordance with law, regulation, policies, and guidelines in effect at the time the care was provided or requested or at the time of the initial determination, reconsideration, or formal review decision involving a provider request for approval as an authorized CHAMPUS provider. The formal review **is** performed **by** the Chief, Appeals and Hearings, **OCHAMPUS**, or a designee, and is a thorough review of the case. The formal review determination shall **be** based on the information upon which the initial determination or reconsideration determination was based, and any additional information the appealing party may submit or **OCHAMPUS** may obtain.

3. Timeliness of formal review determination. The Chief, Appeals and Hearings, **OCHAMPUS**, or a designee, normally shall issue the formal review determination no later than 90 days from the date of receipt of the request for formal review by the **OCHAMPUS**.

4. Notice of formal review determination. The Chief, Appeals and Hearings, **OCHAMPUS**, or a designee, shall issue a written notice of the formal review determination to the appealing party at his or her last known address. The notice of the formal review determination must contain the following elements:

a. A statement of the issue or issues under appeal.

b. The provisions of law, regulation, policies, and guidelines that **apply** to the issue or issues under appeal.

c. A discussion of the original and additional information that is relevant to the issue **or** issues under appeal.

d. Whether the formal review upholds the prior determination or determinations or reverses the prior determination or determinations in whole or in part and the rationale for the action.

e. A statement of the right to request a hearing in any case when the formal review determination is less-than **fully** favorable, the issue is appealable, and the amount in dispute is \$300 or more.

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5. Effect of formal review determination. The formal review **determina-**  
tion is final if one or more of the following exist:

- a. The issue is not appealable. (See subsection A.6., above.)
- b. The amount in dispute is less than \$300. (See subsection A.7., above. )
- c. Appeal **rights** have been offered but a request for hearing is not received by **OCHAMPUS** within 60 days **of** the date of the notice of the formal review determination.

D. HEARING

Any party to the initial determination may request a hearing if the party is dissatisfied with the formal review determination and the formal review determination is not final under the provisions of subsection C.S., above, or the initial determination involves the sanctioning of a provider under Chapter **9** of this **Regulation and involves an appealable issue.**

1. Requesting a hearing

- a. Written request required. The request shall be in writing, state the specific matter in dispute, include a copy of the appropriate initial determination or formal review determination being appealed, and include any additional information or documents not submitted previously.
- b. Where to file. The request **shall** be submitted to the Chief, Appeals and Hearings, **OCHAMPUS**, Aurora, Colorado 80045-6900.
- c. Allowed time to file. The request shall be mailed within 60 days after the date of the notice of the initial determination or formal review determination being appealed.
- d. Official filing date. A request for hearing shall be deemed **filed** on the date it is mailed and postmarked. If a request **for** hearing does not have a postmark, it shall be deemed filed on the date received by **OCHAMPUS**.

2. Hearing process. A hearing is an administrative proceeding in which facts relevant to the appealable issue(s) in the case are presented and evaluated in relation to applicable law, regulation, policies, and guidelines in effect at the time the care in dispute was provided or requested; at the time of the initial determination, formal review determination, or hearing decision involving a provider request for approval under CHAMPUS as an authorized provider; or at the time of the act or event which is the basis for the imposition of sanctions under this Regulation. A hearing, except for an appeal involving a provider sanction, generally shall be conducted as a **nonadversary**, administrative proceeding. However, an authorized party, to any hearing, including CHAMPUS, may submit additional evidence or testimony relevant to the appealable issue(s) and may appoint a representative, including legal counsel, to participate in the hearing process.

### 3. Timeliness of hearing

a. ~~Except~~ as otherwise provided in this chapter, within 60 days following receipt of a request for hearing, the Director, OCHAMPUS, or a designee, normally will appoint a hearing officer to hear the appeal. Copies of all records in the possession of OCHAMPUS that are pertinent to the matter to be heard or that formed the basis of the formal review determination shall be provided to the hearing officer and, upon request, to the appealing party.

b. The hearing officer, except as otherwise provided in this chapter, normally shall have 60 days from the date of written notice of assignment to review the file, schedule and hold the hearing, and issue a recommended decision to the Director, OCHAMPUS, or designee.

c. The Director, OCHAMPUS, or designee, may delay the case assignment to the hearing officer if additional information is needed that cannot be obtained and included in the record within the time period specified above. The appealing party will be notified in writing of the delay resulting from the request for additional information. The Director, OCHAMPUS, or a designee, in such circumstances, will assign the case to a hearing officer within 30 days of receipt of all such additional information, or within 60 days of receipt of the request for hearing, whichever shall occur last.

d. The hearing officer may delay submitting the recommended decision if, at the close of the hearing, any party to the hearing requests that the record remain open for submission of additional information. In such circumstances, the hearing officer will have 30 days following receipt of all such additional information including comments from the other parties to the hearing concerning the additional information to submit the recommended decision to the Director, OCHAMPUS, or a designee.

4. Representation at a hearing. Any party to the hearing may appoint a representative to act on behalf of the party at the hearing, unless such person currently is disqualified or suspended from acting in another Federal administrative proceeding, or unless otherwise prohibited by law, this Regulation, or any other DoD regulation (see paragraph A.2.b., above). A hearing officer may refuse to allow any person to represent a party at the hearing when such person engages in unethical, disruptive, or contemptuous conduct, or intentionally fails to comply with proper instructions or requests of the hearing officer, or the provisions of this Regulation. The representative shall have the same authority as the appealing party and notice given to the representative shall constitute notice required to be given to the appealing party.

5. Consolidation of proceedings. The Director, OCHAMPUS, or a designee, may consolidate any number of proceedings for hearing when the facts and circumstances are similar and no substantial right of an appealing party will be prejudiced.

6. Authority of the hearing officer. The hearing officer in exercising the authority to conduct a hearing under this Regulation will be bound by 10 U.S.C., Chapter 55 (reference (a)), and this Regulation. The hearing officer in addressing substantive, appealable issues shall be bound by policy manuals, instructions, procedures, and other guidelines issued by the

**ASD(HA)**, or a designee, or by the Director, OCHAMPUS, or a designee, in effect for the period in which the matter in dispute arose. A hearing officer may not establish or amend policy, procedures, instructions, or guidelines. However, the hearing officer may recommend **reconsideration** of the policy, procedures, instructions or guidelines by the **ASD(HA)**, or a designee, when the final decision is issued in the case.

7. Disqualification of hearing officer. A hearing officer voluntarily shall disqualify himself or herself and withdraw from any proceeding in which the hearing officer cannot give fair or impartial hearing, or in which there is a conflict of interest. A party to the hearing may request the disqualification of a hearing officer by filing a statement detailing the reasons the party believes that a fair and impartial hearing cannot be given or that a conflict of interest exists. Such request immediately shall be sent by the appealing party or the hearing officer to the Director, **OCHAMPUS**, or a designee, who shall investigate the allegations and advise the complaining party of the decision in writing. A copy of such decision also shall be mailed to all other parties to the hearing. If the Director, **OCHAMPUS**, or a designee, reassigns the case to another hearing officer, no investigation shall be required,

8. Notice and scheduling of hearing. The hearing officer shall issue by certified mail, when practicable, a written notice to the parties to the hearing of the time and place for the hearing. Such notice shall be mailed at least 15 days before the scheduled date of the hearing. The notice shall contain sufficient information about the hearing procedure, including the party's right to representation, to allow for effective preparation. The notice also **shall** advise the appealing party of the right to request a copy of the record before the hearing. Additionally, the notice shall advise the appealing party of his or her responsibility to furnish the hearing officer, no later than 7 days before the scheduled date of the hearing, a list of all witnesses who will testify and a copy of all additional information to be presented at the hearing. The time and place of the hearing shall be determined by the hearing officer, who **shall** select a reasonable time and location mutually convenient to the appealing party and **OCHAMPUS**.

9. Dismissal of request for hearing

a. By application of appealing party. A request for hearing may be dismissed by the Director, **OCHAMPUS**, or a designee, at any time before to the mailing of the final decision, upon the application of the appealing party. A request for dismissal must be in writing and filed with the Chief, Appeals and Hearings, OCHAMPUS, or the hearing officer. When dismissal is requested, the formal review determination in the case shall be deemed final, unless the dismissal is vacated in accordance with paragraph D.9.e., below.

b. By stipulation of the parties to the hearing. A request for a hearing may be dismissed by the Director, OCHAMPUS, or a designee, at any time before to the mailing of notice of the final decision under a stipulation agreement between the appealing party and OCHAMPUS. When dismissal is entered under a stipulation, the formal review decision shall be deemed final, unless the dismissal is vacated in accordance with paragraph D.9.e., below.

c. By abandonment. The Director, **OCHAMPUS**, or a designee, may dismiss a request for hearing upon abandonment by the appealing party.

(1) An appealing party ~~shall~~ be deemed to have abandoned a request for hearing, other than when personal appearance is waived in accordance with paragraph **D.11.1.**, **below**, if neither the appealing party nor an appointed representative appears at the time and place fixed for the hearing and if, within 10 days after the mailing of a notice by certified mail to the appealing party **by** the hearing officer to show cause, such party does not show good and sufficient cause for such failure to appear and failure to notify the hearing officer before the time fixed for hearing that an appearance could not **be** made.

(2) An appealing party shall be deemed to have abandoned a request for hearing if, before assignment of the case to the hearing officer, **OCHAMPUS** is unable **to** locate either the appealing party or an appointed representative.

(3) An appealing party shall be deemed to have abandoned a request for hearing if the appealing party fails to prosecute the appeal. Failure to prosecute the appeal includes, but is not limited to, an appealing party's failure to provide information reasonably requested by **OCHAMPUS** or the hearing officer for consideration in the appeal.

(4) If the Director, **OCHAMPUS**, or a designee, dismisses the request for hearing because of abandonment, the formal review determination in the case **shall** be deemed to be final, unless the dismissal is vacated in accordance with paragraph **D.9.e.**, below.

d. For cause. The Director, **OCHAMPUS**, or a designee, may dismiss for cause a request for **hearing** either entirely or as to any stated issue. If the Director, **OCHAMPUS**, or a designee, dismisses a hearing request for cause, the formal review determination in the case **shall** be deemed to be final, unless the dismissal is vacated **in** accordance with paragraph **D.9.e.**, below. A dismissal for cause may be issued under any of the following circumstances:

(1) When the appealing party requesting the hearing is not a proper party under paragraph **A.2.a.**, above, or does not otherwise have a right to participate in a hearing.

(2) When the appealing party who filed the hearing request dies, and there is no information before the Director, **OCHAMPUS**, or a designee, showing that a party to the initial determination who is not an appealing party may be prejudiced by the formal review determination.

(3) When the issue is not appealable (see subsection **A.6.**, above).

(4) When the amount in dispute is less than \$300 (see subsection **A.7.**, above) .

(5) When all appealable issues have been resolved in favor of the appealing party.

e. Vacation of dismissal. Dismissal of a request for hearing may be vacated by the Director, **OCHAMPUS**, or a designee, upon written request of the appealing party, if the request is received within 6 months of the date of the notice of dismissal mailed to the last known address of the party requesting the hearing.

#### 10. Preparation for hearing

a. Preheating statement of contentions. The hearing officer may on reasonable notice require a **party to** the hearing to submit a written statement of contentions and reasons. The written statement shall be provided to all parties to the hearing before the hearing takes place.

b. Discovery. Upon the written request of a party to the initial determination (including **OCHAMPUS**) and for good cause shown, the hearing officer will allow that party to inspect and **copy all** documents, unless privileged, relevant **to** issues in the proceeding that are in the possession or control of the other party participating in the appeal. The written request shall state clearly what information and documents are required for inspection and the relevance of the documents to the issues in the proceeding. Depositions, interrogatories, requests for admissions, and other forms of preheating discovery are generally not authorized and the Department of Defense does not have subpoena authority for purposes of administrative hearings under this chapter. **If** the hearing officer finds that good cause exists for taking a deposition or interrogatory, the expense shall be assessed to the requesting party, with copies furnished to the hearing officer and the other party or parties to the hearing.

c. Witnesses and evidence. All parties to a hearing are responsible for producing, at each party's **expense**, meaning without reimbursement of payment by CHAMPUS, witnesses and other evidence in their own behalf, and for furnishing copies of any such documentary evidence **to** the hearing officer and other party or parties to the hearing. The Department of Defense is not authorized to subpoena witnesses or records. The hearing officer may issue invitations and requests to individuals to appear and testify without cost to the Government, so that the full facts in the case may be presented.

#### 11. Conduct of hearing

a. Right to open hearing. Because of the personal nature of the matters to be considered, hearings normally shall be closed to the public. However, the appealing party may request an open hearing. If this occurs, the hearing shall be open except when protection of other legitimate Government purposes dictates closing certain portions of the hearing.

b. Right to examine parties to the hearing and their witnesses. Each party to the hearing shall have the right to produce and examine witnesses, to introduce exhibits, to question opposing witnesses on any matter relevant to the issue even though the matter was not covered in the direct examination, to impeach any witness regardless of which party to the

hearing first called the witness to testify, and to rebut **any** evidence presented. Except for those witnesses employed by **OCHAMPUS** at the time of the hearing, or records in the possession of **OCHAMPUS**, a party to a hearing shall be responsible, that is to say no payment or **reimbursement** shall be made by CHAMPUS for the cost or fee associated with producing witnesses or other evidence in the party's own behalf, or for furnishing copies of documentary evidence to the hearing officer and other party or parties to the hearing.

c. **Taking of evidence.** The hearing officer shall control the taking of evidence in a manner best suited to ascertain the facts and safeguard the rights of the parties to the hearing. Before taking evidence, the hearing officer shall identify and state the issues in dispute on the record and the order in which evidence will be received.

d. **Questioning and admission of evidence.** A hearing officer may question any witness and shall admit any relevant evidence. Evidence that is irrelevant or unduly repetitious shall be excluded.

e. **Relevant evidence.** Any relevant evidence shall be admitted, unless unduly repetitious, if it is the type of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of such evidence over objection in civil or criminal actions.

f. **CHAMPUS determination first.** The basis of the CHAMPUS determinations shall be presented to the hearing officer first. The appealing party shall then be given the opportunity to establish affirmatively why this determination is held to be in error.

g. **Testimony.** Testimony shall be taken only on oath, affirmation, or penalty of perjury.

h. **Oral argument and briefs.** At the request of any party to the hearing made before the close of the hearing, the hearing officer shall grant oral argument. If written argument is requested, it shall be granted, and the parties to the hearing shall be advised as to the time and manner within which such argument is to be filed. The hearing officer may require any party to the hearing to submit written memoranda pertaining to any or all issues raised in the hearing.

i. **Continuance of hearing.** A hearing officer may continue a hearing to another time or place on his or her own motion or, upon showing of good cause, at the request of any party. Written notice of the time and place of the continued hearing, except as otherwise provided here, shall be in accordance with this Regulation. When a continuance is ordered during a hearing, oral notice of the time and place of the continued hearing may be given to each party to the hearing who is present at the hearing.



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j. Continuance for additional evidence. If the hearing officer determines, after a hearing has begun, that additional evidence is necessary for the proper determination of the case, the following procedures may be invoked:

(1) Continue hearing. The hearing may be continued to a later date in accordance with paragraph D.11.i. , above.

(2) Closed hearing. The hearing may be closed, but the record held open in order to permit the introduction of additional evidence. Any evidence submitted after the close of the hearing shall be made available to all parties to the hearing, and all parties to the hearing shall have the opportunity for comment. The hearing officer may reopen the hearing if any portion of the additional evidence makes further hearing desirable. Notice thereof shall be given in accordance with subsection D.8., above.

k. Transcript of hearing. A verbatim taped record of the hearing shall be made and shall become a permanent part of the record. Upon request, the appealing party shall be furnished a duplicate copy of the tape. A typed transcript of the testimony will be made only when determined to be necessary by OCHAMPUS. If a typed transcript is made, the appealing party shall be furnished a copy without charge. Corrections shall be allowed in the typed transcript by the hearing officer solely for the purpose of conforming the transcript to the actual testimony.

1. Waiver of right to appear and present evidence. If all parties waive their right to appear before the hearing officer for presenting evidence and contentions personally or by representation, it will not be necessary for the hearing officer to give notice of, or to conduct a formal hearing. A waiver of the right to appear must be in writing and filed with the hearing officer or the Chief, Appeals and Hearings, OCHAMPUS. Such waiver may be withdrawn by the party by written notice received by the hearing officer or Chief, Appeals and Hearings, no later than 7 days before the scheduled hearing or the mailing of notice of the final decision, whichever occurs first. For purposes of this chapter, failure of a party to appear personally or by representation after filing written notice of waiver, will not be cause for finding of abandonment and the hearing officer shall make the recommended decision on the basis of all evidence of record.

12. Recommended decision. At the conclusion of the hearing and after the record has been closed, the matter shall be taken under consideration by the hearing officer. Within the time frames previously set forth in this chapter, the hearing officer shall submit to the Director, OCHAMPUS, or a designee, a written recommended decision containing a statement of findings and a statement of reasons based on the evidence adduced at the hearing and otherwise included in the hearing record.

a. Statement of findings. A statement of findings is a clear and concise statement of fact evidenced in the record or conclusions that readily can be deduced from the evidence of record. Each finding must be supported by substantial evidence that is defined as such evidence as a reasonable mind can accept as adequate to support a conclusion.

b. Statement of reasons. A reason is a clear and concise statement of law, regulation, policies, or guidelines relating to the statement of findings that provides the basis for the recommended decision.

E. FINAL DECISION

1. Director, OCHAMPUS. The recommended decision shall be reviewed by the Director, **OCHAMPUS**, or a designee, who shall adopt or reject the recommended decision or refer the recommended decision for review by the Assistant **Secretary** of Defense (Health Affairs). The Director, **OCHAMPUS**, or designee, normally will take action with regard to the recommended decision within 90 days of receipt of the recommended decision or receipt of the revised recommended decision following a remand order to the Hearing Officer.

a. Final action. If the Director, **OCHAMPUS**, or a designee, concurs in the **recommended decision**, no further agency action is required and the recommended decision, as adopted by the Director, **OCHAMPUS**, is the final agency decision in the appeal. In the case of rejection, the Director, **OCHAMPUS**, or a designee, shall state the reason for disagreement with the recommended decision and the underlying facts supporting such disagreement. In these circumstances, the Director, **OCHAMPUS**, or a designee, may have a **final** decision prepared based on the record, or may remand the matter to the Hearing Officer for appropriate action. In the latter instance, the Hearing Officer shall take appropriate action and submit a new recommended decision within 60 days of receipt of the remand order. The decision by the Director, **OCHAMPUS**, or a designee, concerning a case arising under the procedures of this Chapter 10, shall be the final agency decision and the final decision shall be sent by certified mail to the appealing party or parties. A final agency decision under this subsection E1. will not be relied on, used, or cited as precedent by the Department of Defense in the administration of CHAMPUS.

b. Referral for review by ASD(HA). The Director, **OCHAMPUS**, or a designee, may refer a hearing case to the Assistant Secretary of Defense (Health Affairs) when the hearing involves the resolution of CHAMPUS policy and issuance of a final decision which may be relied on, used, or cited as precedent in the administration of CHAMPUS. In such a circumstance, the Director, **OCHAMPUS**, or a designee, **shall** forward the recommended decision, together with the recommendation of the Director, **OCHAMPUS**, or a designee, regarding disposition of the hearing case.

2. ASD(HA). The **ASD(HA)**, or a designee, after reviewing a case arising under the procedures of this Chapter 10 may issue a final decision based on the record in the hearing case or remand the case to the Director, **OCHAMPUS**, or a designee, for appropriate action. A decision issued by the **ASD(HA)**, or a designee, shall be the final agency decision in the appeal and a copy of the final decision shall be sent by certified mail to the appealing party or parties. A final decision of the **ASD(HA)**, or a designee, issued under this subsection E.2. may be relied on, used, or cited as precedent in the administration of CHAMPUS.